

advised them to change the ownership structure and integration proposal so that Charles would be the sole voting stockholder and sole integrated principal. Bernard was to have no management role at the station. This was done merely in order to take advantage of FCC comparative policies. Embrey will nevertheless still play a significant role at the station (para. 34). Accordingly, it must be concluded that the initial part-time and nominal integration proposal of Charles and Bernard is the authentic one. The one devised by FCC counsel is only for cosmetic purposes and is not bona fide. Atlantic City Community Broadcasting, Inc., integration pledges which are mere boiler-plate paper proposals of FCC counsel must be rejected.

77. Bernard conceded that Charles does not have positive control of the corporation and application, only negative control (para. 38). This admission is yet another independent basis to deny all integration credit to WII. Anax Broadcasting, 87 FCC2d 483, 488, para. 15 (1981), all legal control must be vested in the active integrated owner in order to receive integration credit.

78. A further independent basis to reject the WII integration proposal is that Bernard is not actually insulated from WII. Records on file with the State of Ohio show that he is still the Secretary of the corporation (para. 38). A purportedly insulated stockholder serving as an officer of a corporation breaches the wall of insulation. Saltaire Communications, Inc., 8 FCC Rcd 6284, n. 2 (1993); Evergreen Broadcasting Co., 6 FCC Rcd 5599, 5607, n. 27 (1991).

79. The wall of insulation has been continuously breached by Bernard's control over the funds for the application. WII has no separate checking account. All funding and disbursements for the WII application have been through the checking account for the law firm in which Bernard is a fifty (50%) per cent general partner (para. 39). This is conclusive that Bernard has legal control over the WII application. Evergreen Broadcasting Co., 5607, n. 24; Richardson Broadcast Group, 7 FCC Rcd 1583, 1587, para. 25, 1590, n. 16 (1992); Isis Broadcast Group, 7 FCC Rcd 5125, 5131-5132, paras. 23-25 (Rev. Bd. 1992), the

interest of a non-voting stockholder must be attributed where he controls the payment of bills, aff'd, FCC 93-441, n. 8, rel. September 24, 1993.

80. WII would receive a diversification preference (para. 41). It makes no claim for an auxiliary power preference (para. 42).

Shellee F. Davis

81. Davis is not entitled to any integration credit. She failed to advance a specific and convincing proposal to divest her current full-time occupation and business, Britt Business Systems, Inc. As previously noted, the very existence of an outside business renders questionable an integration commitment in the absence of additional showings by the applicant of the reliability of its integration proposal. Blancett Broadcasting Co. Applicants have the burden to establish how they will effectuate their integration proposals. Cuban-American Limited. The proponent of an integration proposal must allay any substantial doubts as to effectuating its proposal. Knoxville Broadcasting Corp. To meet this burden, an applicant must present a detailed and convincing plan as to how it will accommodate outside business interests with its integration proposal. Naguabo Broadcasting Co. In order to receive integration credit, an applicant must advance a specific proposal and must establish reasonable assurance that it will be carried out. Royce International Broadcasting. In situations where an applicant proposing full-time integration has other substantial ongoing business interests, a generalized promise to reduce the time spent on a significant business interest is insufficient. Leininger-Geddes Partnership.

82. Davis is currently the President, manager, and sole owner of Britt. She has been the owner since 1988 and personally manages the company. It has many prestigious customers, is the number one office equipment dealer in the Mid-West, and has gross revenues of over one million (\$1,000,000) dollars per year. Davis' total yearly compensation from Britt is over one hundred thousand (\$100,000) dollars (para. 45). She has made no effort to sell her company. No appraisal has been done as to its fair market value. If Davis could not obtain

an acceptable price, she would not sell Britt. The value of Britt as a company includes its dealership to sell office equipment. These dealerships cannot be sold or assigned without the prior written permission of the equipment manufacturer. Davis has made no inquiry about obtaining such consent (para. 46). Accordingly, it must be concluded that Davis has no plan, or even a bona fide intention, to sell or divest Britt. Indeed, it would be irrational and contrary to Davis' financial interests to sell or divest Britt, which is a cash-flow machine dependent on her personal management and which has no readily apparent resale value.

83. Other facts demonstrate that Davis has no bona fide intention to sell or divest Britt and to go into the radio business. Prior to the time in November-December 1991, when Davis first learned of the availability of the Westerville frequency, she had no interest or desire to own and manage a radio station, but had considered going into the flower arranging or picture framing business (para. 47).

84. The lack of bona fides of Davis' intentions is further demonstrated by the fact that since November-December 1991, she has done no market analysis as to a format for the proposed station, has made no revenue projections for the proposed station, has done no research as to the potential profitability of the proposed station, does not know the past income or operation costs for Station WBBY-FM (which she intends to lease), does not actually know how much it would cost to operate a station, does not know the overall radio advertising revenues for the local market, does not know anything about radio advertising revenues, does not know anything about the potential profitability of FM stations in the Columbus market, does not know anything about the economic state of radio in general, has done very little to learn about the radio industry, and does not even know if she will have a salary at the proposed station (paras. 48-49).

85. Perhaps, most telling of Davis' actual intentions is that her proposed station would be mortgaged, whereas Britt has no debt to outside parties (para. 46). It would be highly irrational to dispose of an unmortgaged and financially

successful business in order to acquire a mortgaged start-up business in which Davis has no past experience and has no knowledge as to whether it would be financially viable (paras. 48-49).

86. The seemingly irrational conduct of Davis can be explained by the fact that her husband is a former FM application speculator. Davis' brother-in-law, who is a former FM applicant, referred her to his FCC counsel and her husband told her to do what FCC counsel said to do. She has dutifully followed counsel's directives (para. 47). Atlantic City Community Broadcasting, Inc., integration proposal must be rejected where FCC counsel plays dominant role in the application.

87. Another basis to reject Davis' integration proposal is that parts of her hearing exhibit are incorrect (para. 50). Accordingly, her representations have no credibility and thus can not be relied upon.

88. In sum, Davis has woefully failed to meet her burden of proving the bona fides and the reliability of her integration proposal. It is simply unbelievable that Davis will dispose of a successful business in order to start a new business which she knows nothing about and had no interest in until the time for filing applications.

89. Davis would receive a diversification preference (para. 52). Although Davis proposes to provide auxiliary power at her station, she failed to specify whether generators at both the studio and tower site would be installed (para. 53). Therefore, her preference must be given a reduced weight.

Overall Comparative Analysis

90. Because none of the applicants would receive any integration credit, proposed signal coverage becomes the deciding factor in this proceeding. ORA is the preferred applicant under this criteria. It will provide new nighttime service to under-served areas (conclusions, para. 57). This is more significant than any possible advantage which Davis might have in providing slightly more coverage (approximately 5% greater population coverage) to well-served areas (para. 56). Radio Jonesboro, Inc.; Christian Broadcasting of the Midlands, Inc.

91. ORA's advantage over WII is even more decisive since it will also provide approximately fifty (50%) per cent greater coverage than would WII (para. 54). Even if WII was to receive fifty (50%) per cent integration credit, ORA's overall superior coverage would outweigh this slight integration preference. See, Daytona Broadcasting Co., Inc., 97 FCC2d 212, 55 RR2d 1326, 1343, n. 45 (Rev. Bd. 1984), the Commission has long recognized the importance of signal coverage in the comparative analysis. In addition, ORA would have an auxiliary power preference, whereas WII would have none (paras. 58, 80).

92. ORA would prevail over ASF even if it received a twenty-five (25%) per cent integration credit for Frizzell's role (para. 65). With Beauvais' broadcast holdings attributed to ASF, it would be assessed at least a slight to moderate diversification demerit (para. 70). This demerit would outweigh a slight integration preference of twenty-five (25%) per cent. Policy Statement on Comparative Broadcast Hearings, slight diversification preference outweighs slight integration preference. In addition, ORA would have a signal coverage preference over ASF (paras. 55, 57). It would also receive an auxiliary power advantage since ASF's auxiliary proposal can not be credited (paras. 58, 71).

93. ORA would prevail over Ringer even if he was not assessed a diversification demerit based upon his ineffectual proposal to divest his interest in a broadcast station (para. 63). In addition to its signal coverage preference (para. 57), ORA would have an auxiliary power advantage over Ringer since his auxiliary power proposal can not be credited (paras. 58, 64).

Challenge to Integration Policy

94. ORA challenges the Commission's integration policy under the Policy Statement on Comparative Hearings as arbitrary, capricious, irrational, and otherwise contrary to the public interest. See, Bechtel v. FCC; Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566 (D.C. Cir. 1992). The superior engineering and signal coverage proposal of ORA, which would provide new service to under-served areas, would further the Commission's comparative hearing policies and the public interest much more than the artificial and unrealistic

preferred applicant under the areas and population issue based upon its superior engineering proposal and signal coverage.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

John W. Hunter

By: 

Stephen T. Yelverton

October 25, 1993

020979.00001

ORA.PFC

integration proposals of the other competing applicants, which range from the strange and unnatural to the unbelievable.

95. Unlike integration proposals, signal coverage proposals are the least likely to be changed after grant of the construction permit. Chapman Radio & Television Co., 19 FCC2d 185, 236, n. 38 (ALJ 1968), aff'd, 19 FCC2d 157 (Rev. Bd. 1969). Thus, unlike the typical contrived integration proposal, ORA's superior engineering and signal coverage proposal is real and will have lasting benefits to the public. See, FBC, Inc., 95 FCC2d 256, 55 RR2d 1344, 1348, para. 12 (Rev. Bd. 1983), service to under-served areas is one of the Commission's basic missions.

96. ORA's engineering proposal is superior in other significant respects. Only it has a fully-spaced tower site under the current FM spacing rules. The competing applicants propose technically inferior short-spaced sites. Official notice of Commission files requested. See also, Jt. Ex. 1. Under Commission policy, a fully-spaced site is strongly preferred to a short-spaced site. See, North Texas Media, Inc. v. FCC, 778 F.2d 28, 34 (D.C. Cir. 1985).

97. ORA also proposes the use of a non-directional antenna. All of the other applicants, with the exception of WII (whose engineering proposal is in any event otherwise decidedly inferior), propose the use of a directional antenna. Official notice of Commission files requested. See also, Jt. Ex. 1. Although the Commission allows the use of directional antennas in certain limited circumstances, their use is not favored. See, Section 73.215; MM Docket No. 87-121, 6 FCC Rcd 5356, 5360, para. 27 (1991). Accordingly, grant of the application of ORA would overall better serve the Commission's comparative hearing policies and better serve the public interest in view of its engineering superiority.

WHEREFORE, in view of the foregoing, the Presiding Judge is requested to adopt the proposed findings of fact and conclusions of law of ORA, reject those of the other competing applicants, and grant the application of ORA as the

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McMair & Sanford, P.A., do hereby certify that on this 25th day of October, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Proposed Findings of Fact and Conclusions of Law" to the following:

The Honorable Walter C. Miller*
Administrative Law Judge
Federal Communications Commission
Room 213
2000 L Street, N.W.
Washington, D.C. 20554

James Shook, Esquire
Hearing Branch
Federal Communications Commission
Room 7212
2025 M Street, N.W.
Washington, D.C. 20554

Arthur V. Belenduk, Esquire
Smithwick & Belenduk, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036
Counsel for David A. Ringer

James A. Koerner, Esquire
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003
Counsel for ASF Broadcasting Corp.

Eric S. Kravetz, Esquire
Brown, Finn & Nietert, Chartered
1920 M Street, N.W.
Suite 660
Washington, D.C. 20036
Counsel for Wilburn Industries, Inc.

Dan J. Alpert, Esquire
Law Office of Dan J. Alpert
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Shellee F. Davis


Stephen T. Yelverton

*Hand Delivery